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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
3/1/2022
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———♦———

No. 14-20-00496-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1667833
In the 230th District Court
Of Harris County, Texas

———♦———

State of Texas
Appellant

v.

Sanitha Lashay Hatter
Appellee

———♦———

State's Brief on Discretionary Review

———♦———

Clint Morgan
Assistant District Attorney
Harris County, Texas
State Bar No. 24071454
morgan_clinton@dao.hctx.net

500 Jefferson, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826

Kim Ogg
District Attorney
Harris County, Texas

James O'Donnell
Assistant District Attorney
Harris County, Texas

Identification of the Parties

Counsel for the State:

> **Kim Ogg**, District Attorney of Harris County; **James O'Donnell** Assistant District Attorneys in the trial court; **Clint Morgan**, Assistant District Attorney on direct appeal and petition for discretionary review.
>
> 500 Jefferson, Suite 600
> Houston, Texas 77002

Appellee:

> **Sanitha Lashay Hatter**

Counsel for the appellee in the trial court:

> **Natalie Schulz**
>
> 2500 E. TC Jester, Suite 290
> Houston, Texas 77008

Counsel for the appellee on appeal:

> **Tonya Rolland**
>
> 1523 Yale St
> Houston, Texas 77008

Trial Court:

> **Chris Morton**, presiding judge

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Statement of the Case

This is a State's appeal from the trial court's order that the State dismiss a charging instrument.

In 2019 the appellee was indicted for assault of a peace officer. (CR 15). In January 2020 the State moved to dismiss this charge, noting explicitly it reserved the right to refile. (CR 53). The appellee was indicted a second time for the same offense in March 2020. (CR 6).

The appellee filed a motion for "specific performance," alleging the prosecutor made a "gentlemen's agreement" not to refile when the first charge was dismissed. (CR 65-68). The trial court granted the motion for "specific performance," writing on the order: "State is ordered to dismiss." (CR 62-64). When it granted the motion, the trial court orally declared the case "dismissed." (1 RR 30). The State filed a timely notice of appeal. (CR 78-79).

A divided panel of the Fourteenth Court affirmed the trial court's ruling in a published opinion. *State v. Hatter*, 634 S.W.3d 456 (Tex. App.—Houston [14th Dist.] 2021).

Ground for Review

The Fourteenth Court erred by holding that a motion to dismiss that explicitly reserved the State's right to refile was retroactively converted into an "immunity agreement" when the trial court dismissed a subsequent case on grounds of equitable immunity. Nothing in the record shows the trial court ever consented to an immunity agreement.

Summary of the Argument

The Fourteenth Court's published opinion creates a novel and illogical interpretation of this Court's holding in *Smith v. State*, 70 S.W.3d 848 (Tex. Crim. App. 2002). In *Smith* this Court held that for an immunity agreement to be enforceable it must be approved by the trial court and the trial court must be aware it was approving an immunity agreement. Here, the Fourteenth Court held the trial court did not have to be aware of the immunity agreement when the agreement was entered, but could approve an immunity agreement through a subsequent dismissal.

This holding has no basis in *Smith* and no basis in the record. The record shows the trial court based the subsequent dismissal on a theory of equitable immunity, which this Court has declared does not apply in Texas. At no point did the trial court approve an immunity agreement and the Fourteenth Court's holding that a subsequent dismissal on a

different basis counts as retroactive creation of an "immunity agreement" flouts *Smith's* and Article 32.02's requirement that trial courts consent to immunity agreements.

Statement of Facts

The appellee was originally charged with two misdemeanor DWI charges as well as felony assault of a peace officer. (1 RR 7-8). One of the DWI charges came from the same incident as the assault charge. (1 RR 8). Based on the assaulted officer's concern about the appellee's substance abuse problem, the State offered to dismiss the felony charge if the appellee pleaded guilty to the DWI charges. (1 RR 9-10; CR 74).

The appellee had different lawyers for the felony and misdemeanor charges. (CR 75). The lawyer for the felony approved of this deal, but the lawyer for the misdemeanors did not. (CR 75).

While negotiations were ongoing, the felony case got set for trial before the misdemeanor cases. (1 RR 10-11). The felony prosecutor believed it was unfair to proceed to trial on a case the State had offered to dismiss. (1 RR 11, 17). Believing the appellee would wind up pleading guilty to at least one of the DWI charges, the prosecutor moved to dismiss the felony charge while reserving the State's right to refile. (1 RR

10-11). The trial court signed the dismissal on January 20, 2020. (CR 53).

After the felony was dismissed, the DWIs were also dismissed without the felony prosecutor's knowledge. (1 RR 18). The assaulted officer contacted the District Attorney's Office, and supervisors at the office decided to refile the felony charge. (1 RR 12).

The grand jury reindicted the appellee on March 11, 2020. (CR 6). The appellee filed a "Motion for Specific Performance," a brief in support of this motion, and an "affidavit"[1] from defense counsel. (CR 62-63, 65-68). The gist of these documents is that the felony prosecutor had made a "gentlemen's agreement" to dismiss the felony charge and never refile it. The documents did not say the appellee gave any consideration as part of this agreement.

The trial court held a hearing where the prosecutor testified. The prosecutor said he did not remember saying he "promised" not to refile, or making a "gentlemen's agreement" not to refile. (1 RR 13-14). The prosecutor argued it did not matter if he used those phrases, because the appellee gave no consideration for the promise and the trial court

[1] The "affidavit" contains a Harris County District Court seal but does not have a signature showing who it was sworn before. At this point, though, it's not obvious it matters whether the document met the requirements of an affidavit.

did not approve any immunity agreement, so any promise was unenforceable. (1 RR 26-27).

The trial court found that the felony prosecutor was "an honorable, forthright, and honest prosecutor." (1 RR 30). The trial court believed defense counsel's statement that the prosecutor had "promised" to dismiss the case and not refile, and determined the prosecutor just did not remember making the promise. (1 RR 30). After stating "contract law" was not "something that we hear in here," the trial court granted the motion for "specific performance," and declared the case "dismissed." (1 RR 30). On the written order granting the motion for "specific performance," dated June 16, 2020, the trial court handwrote: "State is ordered to dismiss." (CR 64).

In the Fourteenth Court

I. Arguments of the Parties

A. The State appealed, arguing the trial court was without authority to dismiss the case based on an unbargained-for promise that had not been approved by the trial court in the January dismissal.

The State's main argument to the Fourteenth Court was that the January dismissal was not an enforceable immunity agreement because it had not been approved as such by the trial court, as shown by the

dismissal's explicit statement that the "State reserves right to refile." (State's Appellate Brief at 10-11). The State argued that the appellee's due process arguments failed because due process requires dismissal only if the defendant gives consideration as part of the bargaining process. (State's Appellate Brief at 11-12). Finally, the State argued the contract-law concept of "specific performance" did not justify dismissal because a party seeking specific performance must show it fulfilled its end of the contract, and the appellee had not. (State's Appellate Brief at 11-12-14).

B. The appellee argued dismissal was required because of "due process."

The appellee argued, as she had in the trial court, that "due process … requires that a promise by the prosecutor be fulfilled." (Appellee's Appellate Brief at 10 (quoting *Gibson v. State*, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991)). The appellee argued her failure to give any consideration as part of the agreement was the State's fault because the State had dismissed the misdemeanor cases. (*Id.* at 10-11).

II. The Majority and Dissenting Opinions

A. Using an argument it came up with on its own, the panel majority held that the trial court's June dismissal was retroactive approval of the January dismissal as an "immunity agreement."

Writing for a 2-1 majority, Justice Hassan noted the rule that an immunity agreement is not enforceable unless it is approved by the trial court. *Hatter*, 2021 WL 4472551, at *3-4. Even so, she held that the January dismissal—which stated "State reserves right to refile—was part of an enforceable immunity agreement. *Id.* at *4.

This was so because "neither statute nor case law indicates that the trial court's approval of an immunity agreement must be concurrent with the offer itself." *Ibid.* By granting the State's motion to dismiss in January, and the appellee's motion to dismiss in June, the trial court "suppl[ied] the necessary approval both when the agreement was made and when Appellee sought to have it enforced." That is, the June dismissal retroactively approved the prosecutor's unwritten January promise not to refile as an "immunity agreement."

Justice Hassan rejected the State's argument that the prosecutor's "promise" was unenforceable because the appellee had provided no consideration. *Ibid.* This point failed, she held, because the terms and enforcement of an immunity agreement are between the parties, and the

trial court's only role is to approve or reject the agreement. *Ibid.* (citing *Smith*, 70 S.W.3d at 855).

Justice Hassan concluded the majority opinion arguing that if it held the trial prosecutor's promise was unenforceable based on a lack of consideration, it "would effectively decree that a prosecutor's word is worthless, thereby inviting countless foreseeable incidents of mistrust between the State and the accused in Texas." *Id.* at *5.

B. The dissenter would have held the prosecutor's unbargained-for promise was not an "agreement," and it was not enforceable because the appellee gave no consideration.

Justice Jewell dissented because he believed "the majority's disposition has no basis in law and mischaracterizes the facts." *Ibid.* at *5 (Jewell, J., dissenting).

First, Justice Jewell disagreed that there was any sort of agreement: "What the majority characterizes as an 'agreement' is at most a unilateral promise by the prosecutor." *Id.* at *9. Justice Jewell noted that the trial court had found there was a "promise," but the trial court had not found there was any sort of "agreement."

Relying on contract law, Justice Jewell would have held that for an "agreement" to exist there needed to be consideration from both sides.

Ibid. He characterized the prosecutor's gratuitous promise as "at most a unilateral promise, which generally is not enforceable absent consideration." *Ibid.* The lack of consideration made the promise "illusory" and unenforceable. *Ibid.*

Justice Jewell questioned whether the prosecutor's statement was even a "promise." That's because a promise must be "so made as to justify a promissee in understanding that a commitment has been made." *Ibid.* (quoting Restatement (Second) of Contracts, § 2). Because the January motion to dismiss explicitly reserved the State's right to refile, and the appellee was aware of this, the prosecutor's statement was not a promise: "Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promissee who is justified in an expectation of performance." *Ibid.* (quoting Restatement (Second) of Contracts, § 2 cmt. e.).

Justice Jewell moved on to argue against the majority's conclusion that the trial court ever approved an immunity agreement. He began by noting the original motion to dismiss explicitly reserved the right to refile, meaning the January dismissal was not trial court approval of an immunity agreement. *Id.* at *10-11.

Second, he argued the majority's conclusion that the June dismissal was retroactive approval of a January immunity agreement "has several fatal problems." *Id.* at *11. First, the majority had based its ruling on Code of Criminal Procedure Article 32.02, but that article relates only to motions to dismiss filed by the State. *Ibid.* Second, the appellee's motion sought specific performance of a binding agreement, which presupposes a binding agreement. If there was no binding agreement before the appellee filed her motion, there was nothing to enforce and the trial court erred to grant the motion. *Ibid.*

Ground for Review

The Fourteenth Court erred by holding that a motion to dismiss that explicitly reserved the State's right to refile was retroactively converted into an "immunity agreement" when the trial court dismissed a subsequent case on grounds of equitable immunity. Nothing in the record shows the trial court ever consented to an immunity agreement.

For its novel holding that the trial court's ruling in June turned the January dismissal into an immunity agreement—which was not the basis for the trial court's ruling—the panel majority relied on *Smith*. But *Smith* requires the trial court to be aware that a State's motion to dismiss is made pursuant to an immunity agreement for that agreement to be binding. *See Smith*, 70 S.W.3d at *855 (immunity agreement is valid if

"the judge approves that dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement").

Neither the trial court nor the appellee have ever claimed the trial court was aware the January dismissal was pursuant to an immunity agreement. Allowing retroactive "approval" of an agreement undermines *Smith*, which was based on Article 32.02's requirement that dismissal of a case requires the presiding judge's "consent." TEX. CODE CRIM. PROC. art. 32.02. If a judge does not know he is signing an immunity agreement—effectively dismissing all future attempts to charge the defendant—then he cannot consent to it. Allowing retroactive consent like the Fourteenth Court did here encourages messy hearings based on parol evidence, but does not address the basic question *Smith* demands: Did the trial court consent to the dismissal?

Nothing in the trial court's June dismissal shows consent to an immunity agreement. All defense counsel requested was that the trial court enforce the prosecutor's "promise" under principles of "due process." The trial judge's holding was responsive to this request: "I'm inclined to grant [the appellee's] motion for specific performance … which I believe is the honoring of the promise…" (RR 30).

The trial judge never consented to an immunity agreement, nor was he asked to. The trial court's actual ruling—which enforced against the State a promise that had not been consented to by trial court—was actually about equitable immunity, a doctrine this Court has emphasized does not apply in Texas. *See Graham v. State*, 994 S.W.2d 651, 656 (Tex. Crim. App. 1999) (rejecting contention that promise not to prosecute that was not approved by trial court was binding); *Smith*, 70 S.W.3d at 851 (citing *Graham* for proposition that "the doctrine of equitable immunity does not exist in Texas.").

On appeal from an order dismissing an indictment, appellate courts defer to the trial court's fact findings but review *de novo* legal conclusions that do not turn on credibility *de novo*. *State v. Krizan-Wilson*, 354 S.W.3d 808, 815 (Tex. Crim. App. 2011). The trial court found there was a "promise," but it never found there was an immunity agreement nor did it consent to an immunity agreement. The trial court's ruling regarded due process, or equitable immunity, or maybe specific performance. The trial court's ruling did not regard an approved immunity agreement because no one claimed there was an approved immunity agreement.

The Fourteenth Court erred to hold that the trial court's ruling about the enforceability of the prosecutor's promise was approval of an immunity agreement. Because the trial court never approved an immunity agreement, that could not be a basis for dismissal and the Fourteenth Court erred by affirming the trial court on that basis.

Conclusion

The State asks this Court to grant review, reverse the Fourteenth Court's judgment, and remand the case to the trial court with orders to reinstate the charge. Alternatively this Court could reverse the Fourteenth Court and remand for consideration of the trial court's ruling and the appellee's arguments.

KIM OGG
District Attorney
Harris County, Texas

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

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Tonya Rolland
tonya@rollandlaw.com

Stacey Soule
information@spa.texas.gov

/s/ C.A. Morgan
CLINT MORGAN
Assistant District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

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Associated Case Party: Sanitha Hatter

Name	BarNumber	Email	TimestampSubmitted	Status
Tonya Rolland		tonya@rollandlaw.com	2/28/2022 11:17:08 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.txcourts.gov	2/28/2022 11:17:08 AM	SENT